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In the Supreme Court of the United States

Nos. 462 and 463

OCTOBER TERM 1964

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Petitioners,

vs.

FEDERAL POWER COMMISSION, ET AL.,

Respondent.

STATE OF OREGON, ACTING BY AND THROUGH SAM R. HALEY, PUBLIC UTILITY COMMISSIONER OF OREGON, THE STATE WATER RESOURCES BOARD, THE OREGON STATE GAME COMMISSION, AND THE FISH COMMISSIONER OF OREGON,

Respondent.

BRIEF OF RESPONDENT STATE OF OREGON

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IN ANSWER TO WASHINGTON PUBLIC POWER SUPPLY SYSTEM BRIEF

The Court of Appeals and the Federal Power Commission recognized that Section 5 grants an applicant priority over all other applicants when applicant is a holder of a preliminary permit.

ARGUMENT

The priority under Section 5 is an important element in accomplishing what this Court has described as a major purpose of the Act—the encouragement of non-

federal investment in hdyroelectric development. In *Federal Power Commission v. Niagara Mohawk Power Corp.* (1953) 347 U.S. 239, 251, this Court states:

> "* * * [T]he plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties.
>
> "The Act—'discloses' both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. * * *' "

The preliminary permit protection is vital to public agencies as well as to private companies, for a public agency's investment in studies for development of a reach of river could be jeopardized by another public agency's license application. As noted by the Federal Power Commission (Commission),

> "[T]he purpose of the priority provisions is to encourage development of the nation's waterways by giving reasonable protection to a party investigating the development of a given reach of the river. * * * The priority provisions were drawn to afford protection to one who makes such investigations, irrespective of whether the party involved is a private or public agency." (R.787)

The term "reach" was defined by the parties at the prehearing conference as extending from the tailwater of the Chiila Gardens project on the Snake to the normal pool elevation of the Hells Canyon project on the Snake, and to the normal pool elevation of the future Freedom project on the Salmon River. (R.621 note 10).

The Commission correctly analyzed the notice requirement of Section 4 (f) of the Act. When a preliminary permit is filed, notice of the application is given to "any state or municipality likely to be interested in or affected by such application." It was known by Washington Public Power Supply System (WPPSS) if Pacific Northwest Power Company (PNPC) eventually received a license for the proposed project, construction at other competing sites would be precluded forever. (R. 256) As the Commission noted, "[o]nce a party, preference or otherwise, has a permit describing a project which would develop a specific stretch of river, everyone is on notice that the permittee has priority to construct at least the project described in the permit. Quite clearly, this would foreclose *any* development on that stretch of the river contemplated by any other party. It is therefore inconsequential, as far as notice is concerned, if the construction plans are altered as long as the same reach of river is involved." (R. 654)

There is a serious question respecting the legal status of WPPSS outside the State of Washington. Section 9 (b) of the Federal Power Act requires from license applicants:

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and, distributing power, and in any other business

necessary to effect the purposes of a license under this Act."

A U. S. District Court has found that WPPSS lacks authority from its state of Washington to develop hydroelectric projects outside the State of Washington. *WPPSS v. PNPC* (1963) 217 F. Supp. 481.

Furthermore Idaho has a statute prohibiting government municipal corporation, quasi-municipal corporation or political unit organized or existing under the laws of any other state to have title to or interest in any property used in the generation, transmission, distribution or supply of electric power and energy located within the State of Idaho. Idaho Code § 61-327.

WPPSS claims a priority as a "municipality" under Section 7(a). The Act in Section 3(7) defines "municipality" to mean "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State *competent under the laws thereof to carry on the business* of developing, transmitting, utilizing, or distributing power." (Emphasis supplied). As noted above *WPPSS v. PNPC* (1963) F. Supp. 481 determined that WPPSS had no authority to construct any hydroelectric propects outside the State of Washington. Therefore WPPSS does not come within the definition of a "municipality" and does not enjoy any priority of Section 7(a).

It is submitted that Section 7(a) grants a preference only in issuing a preliminary permit and the "municipality" receives no priority at a licensing hearing unless no preliminary permit has issued. Where a preliminary

permit has issued then the permitee has a priority over other applicants for license under Section 5 which provides that the sole purpose of the preliminary permit is to maintain priority of the applicant.

Section 5 provides that each preliminary permit shall set forth conditions under which priority shall be maintained and may be cancelled only "by order of the Commission upon failure of permittee to comply with the conditions thereof or for other good cause shown *after* notice and opportunity for hearing." (Emphasis supplied). The Commission has never entered an order cancelling the preliminary permit of PNPC.

IN ANSWER TO STEWART L. UDALL, SECRETARY OF THE INTERIOR, BRIEF

The Commission has fully considered the arguments of the Secretary of the Interior and considered the whole record and has determined that construction of the High Mountain Sheep project by PNPC to be in the public interest and does not require federal construction.

ARGUMENT

Section 7(b) of the Act provides: [16 USC 800(b)]

> "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application * * *."

Congress has made the question of federal development to be within the judgment of the Commission and not within the judgment of the Secretary of Interior (Secretary). There is relevant evidence regarding federal development. This is admitted by the Secretary in his brief. (Pet. B. 11)

The Secretary urges federal development for federal development sake. He reasons that federal development is so superior it raises a presumption in its favor before the Commission. (Pet. B. 16) He then contends that this principal is particularly applicable to the High Mountain Sheep Project.

The public will best benefit from the High Mountain Sheep Project if it is built at the earliest possible time. The conditions placed on the permit by the Commission adequately safeguard the public interest in all benefits of the dam. (R.786) Direct benefit will inure to the customers of PNPC in Oregon. 80% of the electric customers in Oregon are served by PNPC members.

This Court has rejected the contention that the Commission is required by § 7(b) of the Act to recommend federal construction of a hydroelectric project. *Chapman v. Federal Power Commission, supra,* 345 US at 172.

More compelling facts for invoking presumptions or inferences existed in that case then exists here. The Court rejected these facts as a "tenuous chain of inferences." *Chapman v. Federal Power Commission, supra,* 345 US at 169.

The duty of determining whether federal develop-

ment is necessary to protect the public interest is for the Commission and not for the Court. The opinion in the *Chapman Case* states at page 174:

> "Whatever the merits of the controversy as to which agency—the Government or a private party —should construct this project, that question is not within our province."

The Commission has considered the arguments of the Secretary, the representations of the Secretary, official notice of public documents concerning the Snake and Columbia River Projects and evidence put in by the applicants. The Commission has determined on the bases of all the record that federal development was not warranted. (R.664-669; R.781-786)

Many examples of the Commission's consideration of the merit of federal construction can be found in its order:

> "Whether we should recommend federal development rather than development by PNPC is an important issue." (R.664)
>
> "While we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position." (R.665)
>
> "One of the principal reasons for the Department's opposition to non-federal construction appears to be its concern over a decline in BPA revenues which it feels might be accelerated if HMS power were made available directly or indirectly to some of its existing customers. As indicated above, however, we are convinced that PNPC specifically will have need for the additional power which could be made available by early construction of HMS, * *." (R.669) (See also Pet. B. 35)

> "Interior initially reargues that 'there is no present regional need for the power to be generated by the High Mountain Sheep project which would balance the probably damage to the fish resource.' " (R.781)

The Commission has performed exactly within the scope of its duties as stated at page 171 in the Chapman Case:

> "Once recognizing, as we do, the Commission was not deprived of its power to entertain the application for a license, we cannot say, within the limited scope of review open to use that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason." 345 US at 171.

The Commission has fully considered the arguments of WPPSS and of the Secretary. The Commission's administrative interpretation has " 'warrant in the record' and a reasonable basis in law." *Labor Board v. Hearst Publication,* (1944) 322 US 111, 131; *Chapman v. Federal Power Commission* (1952) 345 US 153, 171.

CONCLUSION

For these reasons, the order of the Federal Power Commission should be sustained and the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Relevant Sections of the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1063, as amedned, 16 USC §§ 791-823)

Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power:

* * *

[41 Stat. 1063, as amended, 16 U.S.C. § 796 (1964)]

Sec. 4. (f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated. [41 Stat. 1065, as amended, 16 U.S.C. § 797 (1964)]

* * *

Sec. 5. Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing. [41 Stat. 1067, as amended, 16 U.S.C. § 798 (1964)]

* * *

Sec. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be

satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067, as amended, 16 U.S.C. § 800 (1964)]

* * *

Sec. 9. That each applicant for a license hereunder shall submit to the commission—

* * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act. [41 Stat. 1068, as amended, 16 U.S.C. § 802 (1964)]